land for himself. The vitally important thing to my mind is that the chargee is in those circumstances entitled to compel the sale of the land. It is difficult to see what the power given to the chargee by section 136 can be unless it be a right or interest in land.

I am reinforced in this view by the terms of section 85 of the Land Enactment to which I have already referred in which the words used are ". . . . . upon the registration of any instrument . . . . . the land shall become liable as security . . . . ." Upon the registration of a charge the land shall become liable as security. Does this not create a right or interest in that land? Can it be said as a result that a right or interest in that land is not transferred or vested in the chargee by a memorandum of charge?

Again by the Malay Reservations (Amendment) Ordinance, 1954, the power to charge given by the Land Enactment was extended to certain persons and bodies who were specified in a new Schedule 26A. When this Ordinance was in Bill form the Bill referred only to the Land Enactment and made no reference to the Reservations Enactment. However, when the Bill was enacted a new section 9A had been added to the Reservations Enactment together with a new Schedule D. The new sub-section (1) of section 9A reads as follows:

"9A. (1) Notwithstanding anything hereinbefore contained the proprietor of any reservation land may charge such land or any part thereof to any person specified in Schedule D, and may in favour of any such person create, subject to the provisions of section 128 of the Land Enactment a lien by deposit of the issue document of title for such land."

If Mr. Lee's contention is correct this new section 9A and the new Schedule D would, so far as the Reservations Enactment is concerned, as Mr. Lingam says have been completely redundant. I think, however that it was necessary because without it there was a total prohibition against charging land contained in a Malay Reservation except within the limitations prescribed by section 7.

In my opinion, therefore, the charges with which we are concerned constitute a breach of the provisions of sub-section (i) of section 7 of the Reservations Enactment. That being so, by virtue of the provisions of sub-section (i) of section 12 of that Enactment these charges are null and void.

In these circumstances the respondent has shown cause why the land subject to the charges should not be sold by public auction and the Summons is accordingly dismissed with costs.

Summons dismissed.

Solicitors: *Pillai, Lim, Lee & Hwang; S. A. Lingam.*

TOH LAI HENG v. REGINA

[C. C. A. (Rose C.J., Chua & Wee Chong Jin JJ.) November 11, 1960]

[Singapore — Criminal Appeal No. 32 of 1960]

Criminal procedure — Murder trial — Evidence — Dying declaration — Admissibility in evidence — Declaration reduced to writing — Importance of recording actual words where conversation not in mother tongue of either.

A dying declaration need not be proved by writing at all; there are many cases where eye-witnesses at the scene of an attack, or persons arriving shortly thereafter, may hear the last words spoken by a dying man and their recollection of those words will properly be received in evidence. In practice such a witness would be required to give the exact words spoken by the deceased and, in so far as they are relevant, any words spoken to the deceased by the witness himself.

If the dying declaration is reduced to writing, particularly by an investigating Police Officer, Magistrate, or someone of that kind, the actual words of the deceased must be recorded.

In this case the prosecution witness who was called to prove the relevant deposition testified that he reduced into writing briefly the substance of the dying declaration. The deceased and the witness conversed in Malay, which was not the mother tongue of either, and the conversation was recorded in English.

Held: the omission to record the actual words of the deceased was a fatal defect.

Cases referred to:—

(1) *R.* v. *Mitchell* (1892) 17 Cox C.C. 503.

(2) *R.* v. *Bottomley* (1903) 38 L.J. Newsp. 311.

COURT OF CRIMINAL APPEAL.

T. T. Rajah for the appellant.

A. W. Ghows (Deputy Public Prosecutor) for the respondent.

Cur. Adv. Vult.

Rose, C.J. (delivering the judgment of the Court): The principal point raised in this appeal is that the dying declaration was improperly admitted in evidence.

At page 50 of the record it appears that the learned trial Judge himself put the following question to Inspector Chan Kok Guan, who was the witness called to prove the relevant deposition:—

Q. You really wrote down what he told you just what you told us?

A. No, I put down briefly what he told me.

It would seem to be clear that the meaning of the learned trial Judge's question was "Have you recorded the actual words spoken by the deceased?"

Learned counsel for the defence repeated the same question in a slightly different form, and received the confirmation of the witness.

It is no doubt true that a dying declaration need not be proved by writing at all; and there

are many cases where eye-witnesses at the scene of an attack, or persons arriving shortly thereafter, may hear the last words spoken by a dying man and their recollection of those words will properly be received in evidence. In practice, of course, such a witness would be required to give the exact words spoken by the deceased and, in so far as they are relevant, any words spoken to the deceased by the witness himself.

If, however, the dying declaration is reduced to writing — and this would invariably be the case in the event of the witness in question being an investigating Police Officer, Magistrate or someone of that kind — the actual words of the deceased must be recorded.

The principle underlying this rule was explained by Cave J. in *R.* v. *Mitchell*[1]. The reason for the rule is clear, namely, that if the deceased's statement is taken down in narrative form that amounts in effect to the witness himself drawing inferences and, perhaps, filling gaps in the deceased's statement, which are properly matters within the province of the Judge and jury. It is for them to draw any necessary inferences from the actual words of the deceased and not for the witness who heard the words spoken.

In *R.* v. *Bottomley*[2], the question arose as to whether Cave J. intended to rule that in every case questions as well as answers must be recorded, and Lawrence J. held that a dying declaration in the form of question and answer was admissible although the answers only and not the questions had been recorded.

It seems to us however that there is no real conflict between the two cases as it may well be that in the light of the particular facts — as no doubt was the case in *R.* v. *Bottomley* — the form of the question may be conclusively adduced from the answer itself. In such a case the Court would no doubt hold that the omission to record the question was not a fatal defect. In other cases where the question does not become obvious from a consideration of the answer the omission to record the question might well render the dying declaration inadmissible. This would seem to be a question of fact, depending upon the particular circumstances of each case.

In our opinion, in the present matter the omission to record the actual words of the deceased is a fatal defect. We would add that the importance of recording the actual words is clearly demonstrated in such a case as the present where the deceased and the witness conversed in Malay, which was not the mother tongue of either, and the conversation was recorded in English.

The dying deposition being inadmissible, it is not suggested by the Crown, in the circumstances of this particular case, that the conviction can stand.

The appeal must therefore be allowed and the conviction quashed.

Appeal allowed.

ITAM & ANOR v. ZAIN

[O. C. J. (Syed Sheh Barakbah J.) November 11, 1960]

[Alor Star — Kedah Civil Suit No. 1 of 1960]

Land Laws — Transfer — Deed of Sale — "Penukar Hebah" — Meaning of.

A transfer form (called a "Deed of Sale") transferring land in Kedah in 1911, when the Registration of Documents Enactment, 1310 (1890), was in force, contained the words "Penukar Hebah".

Held: these words did not mean that the transfer was by way of conditional gift.

CIVIL SUIT.

Hwang Yang Chu for the plaintiff.

Wong Sheng Chan for the defendant.

Syed Sheh Barakbah J.: This is somewhat a complicated case due to the death of the parties concerned. The facts briefly are as follows.

Tok Ajar is the grandmother of Khatijah binti Md. Arshad and Habsah binti Mat Salleh who jointly owned a piece of land under an old title Surat Kechik No. 372, Mukim Sala Kechik, District of Kota Star. According to PW1 Tok Ajar approached the said Khatijah and Habsah for a loan of money and as they had no money they offered to give her their land for the purpose of raising a loan. In order to effect the transfer they had to fill in a form called "Deed of Sale" and the transfer was executed on 21.5.1331 (1911), transferring the said land to Tok Ajar. Exhibit P2 is the certified copy of the "Deed of Sale" and Exhibit P-2B is the Register containing the original. At the top right hand corner of Exhibit P2 are the words "Register Penukar No. 60/31". On 2.12.1331 Tok Ajar executed a charge of the said land in favour of Lebai Mat Ariff for $300.00. Tok Ajar died in 1334 (1914) and Lebai Mat Ariff also died in the same year. Habsah then died in February 1945 followed by Khatijah in August 1953.

Yahaya applied for Letters of Administration on the estate of Tok Ajar in December 1953. Yahaya then died and his son Zain (defendant), obtained Letters of Administration *De bonis non* on 30th December, 1959. Itam bin Md. Ariff, the first plaintiff, was appointed administrator of the estate of Khatijah on 3rd December 1958 and Mat Isa, the second plaintiff became administrator of the estate of Habsah binti Mat Salleh on 31st December 1959.

Now both plaintiffs, Itam and Mat Isa as administrators of Khatijah and Habsah respectively claim against Zain bin Yahaya, the defendant, administrator of the estate of Tok Ajar, for the retransfer of the said land to the estate of Khatijah and Habsah (deceased) on the ground that it was a conditional gift. The defendant alleged that it was a sale for $1,200 the amount of which was received by the said Khatijah and Habsah.

Counsel for both parties agreed that the only issue before the Court was the interpretation of the words "Penukar Hebah" mentioned in the title deed, Exhibit "A". What do they really